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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 125

LURIA BROTHERS AND COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

No. 126

BALDWIN-LIMA-HAMILTON CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a)[1] is reported at 389 F.2d 847. The hearing examiner's

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[1] "App." refers to the appendix to the petitions for certiorari. "L. Pet." refers to the petition in No. 125, filed by Luria Brothers and Company, Inc. (hereinafter "Luria"). "M. Pet." refers to the petition in No. 126, filed by Baldwin-Lima-Hamilton Corporation and other steel mills. "R." refers to volumes I through VII of the joint appendix filed in the court of appeals.

initial decision (R. IV, 2161a-2668a) and the final order and opinion of the Federal Trade Commission (App. 40a-121a) are reported at 62 F.T.C. 597 and 652.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1968. A petition for rehearing was denied on February 27, 1968. The petitions for writs of certiorari were filed on May 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the Federal Trade Commission's determination that arrangements by which the petitioning steel producers purchased all or substantially all of their iron and steel scrap requirements from petitioner Luria violated Section 5 of the Federal Trade Commission Act.

2. Whether the court of appeals correctly upheld the cease and desist order entered by the Commission to redress the anticompetitive effects of such arrangements.

STATUTE INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45(a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioners seek review of the unanimous judgment of the court of appeals affirming a Federal Trade Commission decision (App. 34a) which concluded that Luria had entered into an exclusive or substantially exclusive scrap supply arrangement with each petitioning steel mill in violation of Section 5 of the Federal Trade Commission Act.

1. *The Industry and the Parties.* Scrap and pig iron are the principal metals used in making iron and steel. Approximately one-half of the industrial requirements for scrap is supplied by the steel mills themselves from wastes generated by their own activities. The remainder must be purchased from outside sources of discarded iron and steel products. This scrap is collected by junk dealers and peddlers for resale to larger dealers who in turn resell the scrap to brokers or in some cases directly to consumers in competition with brokers. The dealers operate yards where they take possession of the scrap and thereafter sort and process it, while the brokers purchase and resell scrap for their own account without actually taking physical possession of it. A single company may operate both as a scrap dealer and as a broker (App. 5a-6a, 41a-42a; R. III, 1989a-1992a; R. VI, 5696a-5698a).

Luria Brothers and Company, Inc. (petitioner in No. 125) is the largest company in the United States engaged in the business of buying and reselling iron and steel scrap, operating both as a broker and as a dealer (App. 6a-7a, 41a-42a; R. I, 23a, 45a). The 14

petitioners in No. 126 are engaged in various aspects of the production and manufacture of steel products and purchase susbtantial quantities of scrap for use as a raw material in producing "new" iron and steel (App. 42a-43a).[2]

Started in 1889 as a family business in Reading, Pennsylvania, Luria has grown to become the largest scrap broker in the United States with 16 offices and six yards located throughout the United States. By 1946 Luria had already become a substantial supplier to 11 of the petitioning steel mills (App. 6a-7a). It was at approximately this time that Luria entered into arrangements or understandings with a number of the petitioning steel producers to become the substantially exclusive scrap supplier for these companies.

2. *The Arrangements.* The Federal Trade Commission's investigation of the scrap iron industry uncovered a pattern of rapidly developing exclusivity of purchases by the petitioning mills from Luria during

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[2] Among the 14 petitioning mills, Bethlehem Steel Corporation ("Bethlehem") is the largest scrap purchaser in the Eastern part of the United States as well as on the Pacific Coast (App. 12a, 14a; R. IV, 2203a-2204a; R. VI, 5628a-5638a, 5850a). CF&I Steel Corporation ("CF&I") operates the largest scrap consuming plant in the Rocky Mountain area (App. 14a; R. VI, 5647a, 5683a). Weirton Steel Company is the third largest scrap consumer in the Pittsburgh-Youngstown area (R. VI, 5861a-5862a). Granite City Steel Company ("Granite City") is the largest scrap purchaser in the St. Louis area (App. 8a; R. VI, 5864a). Phoenix Steel Corporation and Lukens Steel Company are, respectively, the second and fourth largest scrap purchasers in the North Atlantic area (R. V, 5490a; R. VI, 5621a-5698a). Petitioners' purchases of scrap represent approximately 22 percent of the total domestic scrap purchases (App. 43a; see *id.* at 9a).

the seven-year period beginning with 1947. The nature and formality of the arrangements between Luria and each producer were not, however, uniform.

Bethlehem Steel Corporation, the second largest steel producer in the United States, operates through two subsidiary companies, Bethlehem Steel Company, an East Coast operation, and Bethlehem Pacific Coast Steel Corporation, based on the West Coast (R. IV, 2203a). Prior to 1950, Bethlehem Steel's scrap purchases from Luria for its four plants in the North Atlantic area were relatively small (R. VI, 5630a, 5632a-5634a). Between 1947 and 1949, Luria's share of scrap sales to Bethlehem rose from 15 to 32 percent. This trend accelerated after 1950 to give Luria 83 percent of Bethlehem's purchases in 1954 (App. 12a; R. VI, 5630a, 5632a-5634a). In the meantime, Bethlehem discriminated against many of its former suppliers who also were Luria's competitors (App. 13a).[3] Thus, the Schiavone-Bonomo Corporation, which in 1947 was Bethlehem's second largest scrap

[3] Bethlehem's discrimination took the form of lower brokerage commissions and territorial restrictions. In addition, Bethlehem specifically advised some of Luria's competitors that if they wished to sell scrap to Bethlehem, they would have to do so through Luria (App. 13a; R. I, 487a-510a, 599a-607a, 618a; R. II, 822a-823a, 826a, 959a-965a, 1227a-1228a; R. VII, 6051a-12, 6051a-13, 6051a-14, 6051a-17, 6051a-24, 6051a-27). Indeed, Luria's dominance was further enhanced by Bethlehem's decision to channel shipments from direct suppliers such as industrial fabricators and railroads through Luria (App. 13a; R. I, 329a-342a, 719a-720a, 741a-749a; R. II, 918a, 921a). In consequence, Bethlehem once rejected a large offer of needed scrap from one of Luria's competitors and then purchased the same order from Luria after the latter paid the original broker a dollar more per ton (App. 59a).

supplier (R. VII, 6051a-12), underwent a serious decline in sales to Bethlehem and was subjected to specific discrimination by Bethlehem (R. I, 382a, 420a-423a, 568a, 576a-584a, 590a-592a; R. IV, 2211a-2217a; R. V, 5217a-5218a, 5227a-5229a). By 1954, Schiavone-Bonomo was no longer among Bethlehem's five largest suppliers (R. VII, 6051a-15, 6051a-16, 6051a-18, 6051a-54).

Bethlehem Pacific's practices on the West Coast were not unlike those of its sister company in the East. Until 1950, Bethlehem Pacific purchased scrap from numerous dealers, among which Luria was included only after 1948 (R. III, 1760a-1762a; R. IV, 2262a, 2284a; R. VII, 6054a, 6058a). In October 1950, Luria entered into a ten-year written contract with Bethlehem Pacific to supply its Los Angeles plant (R. IV, 2262a, 2265a-2269a; R. V, 5181a-1-5181a-8). Thereafter, some brokers who had previously supplied the three Bethlehem Pacific plants were told they would have to sell through Luria (App. 15a; R. III, 1635a-1637a, 1646a-1648a, 1668a-1673a, 1676a-1678a, 1687a, 1693a-1697a, 1704a-1705a, 1730a-1731a, 1778a-1781a, 1840a-1842a, 1858a, 1897a, 1902a-1903a, 1915a-1916a, 1935a-1936a). As a result, Luria's position as a scrap supplier of Bethlehem Pacific's Los Angeles plant climbed from one percent in 1949 to 57 percent in 1951 and 94 percent in 1953 (R. VI, 5636a).

Luria entered into similar formal arrangements with the only two plants operating in the Rocky Mountain area, the Geneva, Utah, plant of United States Steel Corporation and the Pueblo plant of the

Colorado Fuel & Iron Corporation (now CF&I Steel Corporation). The Geneva plant accepted Luria's offer to act as its exclusive broker in October 1948 (App. 14a; R. I, 73a; R. IV, 2308a), and announcement of this appointment was sent to the trade (R. IV, 2311a-2312a; V, 5002a). Although U. S. Steel asserts that the agreement was terminated in 1952, no announcement of this fact was disseminated to the trade or even to Luria's home office (App. 14a; R. I, 226a-227a; R. II, 1526a-1527a; R. III, 1558a-1559a, 2129a-2130a). Indeed, Luria's percentage of scrap purchases by the Geneva plant suffered no decline thereafter (R. IV, 2319a; R. VI, 5694a).

CF&I's Pueblo plant is the largest scrap-consuming facility in the Rocky Mountain area (R. VI, 5647a, 5683a). In late May 1946, by its own admission, CF&I informally contracted with Luria to the effect that the latter would serve as the exclusive broker for the Pueblo plant (App. 57a, R. I, 90a; R. IV, 2293a-2294a, 2305a). Formal notice to the trade was transmitted immediately thereafter with direction that future offers of scrap be submitted through Luria's St. Louis office (R. IV, 2294a; R. V, 5167a). The understanding was formalized by a written five-year contract executed on August 23, 1946. The written agreement was terminated on October 9, 1946, by mutual consent of the parties,[4] leaving the earlier oral agreement, however, in full force (App. 14a; R. IV, 2295a, 2307a; R. V, 5168a). Consequently, Luria supplied

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[4] No announcement of the cancellation was made to the trade (R. IV, 2296a).

100 percent of the scrap purchased by CF&I for its Pueblo plant from 1947 through 1954, except during 1951 when Luria's percentage dropped to 95.4 percent (App. 14a; R. IV, 2296a; R. VI, 5647a).[5] And the success of this arrangement from the parties' view eventually led to extension of the exclusive arrangement to CF&I's other plants in the East.

In the St. Louis area Luria entered into a similar arrangement with the Granite City Steel Company, the largest scrap purchaser in that region. Prior to 1950, Granite City purchased nearly all the scrap it consumed from brokers and dealers other than Luria (App. 15a; R. IV, 2349a; R. VI, 5652; R. VII, 6161a-6164a). In March 1950, Granite City and Luria agreed that the later would provide the mill with its future scrap requirements and the trade was subsequently notified of the arrangement (App. 15a; R. II, 1065a-1066a, 1099a-1100a; R. IV, 2349a-2350a, 2353a; R. V, 5171a; R. VII, 6160a). Granite City's former suppliers were thereafter told to submit offers to sell scrap only through Luria (App. 15a; R. II, 1113a-1115a, 1153a-1155a; R. IV, 2350a-2351a; R. VI, 5915a).

Grinnell Corporation's total scrap needs for its Columbia, Pennsylvania, plant were secured through Luria, except in 1951 and 1952, the period of government allocations, when Luria supplied 96 percent and 98 percent, respectively (R. IV, 2384a-2385a; R. VI, 5649a). The trade generally understood Luria to be Grinnell's exclusive broker, and it was the company's

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[5] This decline was due to the availability in 1951 of scrap allocated to the Pueblo mill by government regulations.

established policy to purchase scrap solely from Luria, ignoring offers from other brokers and dealers (R. I, 145a-146a; R. II, 977a-978a, 985a-986a; R. III, 2384a).

A similar arrangement existed between Luria and Bucyrus-Erie Company ("Bucyrus") with respect to the latter's foundries in Erie, Pennsylvania (App. 16a; R. IV, 2379a-2380a; see also R. II, 1043a), and between Luria and Lukens Steel Company ("Lukens") with respect to the latter's plant at Coatesville, Pennsylvania (App. 13a; R. IV, 2359a). Suppliers who attempted to sell to Bucyrus or Lukens were advised that Luria was its broker, and that shipments should be made through Luria (R. II, 1041a-1046a, 1375a-1378a; R. IV, 2359a-2360a, 2381a; R. V, 5007a, 5405a, 5456a, 5458a-5459a). Thus, between 1947 and 1954, Luria supplied between 87 and 91 percent of Lukens' scrap requirements (R. VI, 5653a), and, in 1954, it provided about 84 percent of Bucyrus' scrap needs (App. 10a).

Luria enjoyed similar supply arrangements with Central Iron and Steel Company and Phoenix Iron and Steel Company, subsidiaries of Barium Steel Company;[6] Baldwin-Lima-Hamilton Corporation;[7] Weirton Steel Company, a subsidiary of National

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[6] R. II, 876a-878a; R. IV, 2343a-2348a; R. V, 5892a; R. VI, 5626a. The Commission found that such agreements existed only with respect to a single plant of each of these companies (R. IV, 2343a).

[7] R. I, 125a-126a; R. II, 936a-937a, 940a; R. IV, 2369a-2372a; R. VI, 5622a. The finding relating to Baldwin-Lima-Hamilton was based on an exclusive supply arrangement found to have existed at its Burnham, Pennsylvania, plant.

Steel Corporation;[8] Edgewater Steel Company;[9] Detroit Steel Corporation;[10] and McLouth Steel Corporation.[11] All of these companies, together with those previously discussed, comprise the petitioners in No. 126.

3. *Competitive Impact of the Scrap Supply Arrangements.* In evaluating the economic consequences of the arrangements between Luria and the petitioning steel companies, the Commission determined that iron and steel scrap was the relevant line of commerce (App. 60a-63a), and tested the effects of the arrangements in five basic geographic markets, a regional subdivision within one of these markets, and the nation as a whole (App. 63a-64a).[12]

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[8] R. I, 557a-558a, 563a-564a, 620a-622a, 624a; R. II, 800a-801a, 809a-810a, 817a-818a, 839a, 1315a, 1362a-1363a, 1366a-1367a, 1388a-1395a; R. IV, 2331a-2335a; R. VI, 5658a.

[9] R. IV, 2340a-2343a.

[10] R. I, 275a-276a; R. II, 1274a-1278a, 1281a-1283a, 1432a-1434a; R. IV, 2362a-2365a.

[11] R. I, 119a-120a; R. II, 1443a-1448a; R. IV, 2366a-2368a; R. VI, 5654a.

[12] Luria appears to challenge the data upon which the Commission measured the affects of the arrangements in the various geographic markets (L. Pet. 8-9). Although the Commission constructed a universe based upon scrap purchases from broker-dealer sources which accounted for more than 90 percent of all scrap purchases by 99 percent of domestic steel mills (R. V, 5496a), Luria would apparently require the Commission to canvass as well industrial fabricators, railroads and shipyards which occasionally sell scrap as an incidental feature of their principal operations. As the court below correctly pointed out, however, the Commission was not obliged to undertake a task which "would have reached enormous if not

The steel mill petitioners operating in the North Atlantic region accounted for 80 percent of all scrap purchases from broker-dealer sources between 1947 and 1954. This region represented approximately 20 percent of the nationwide scrap purchases from such sources by domestic mills (App. 7a-8a; R. VI, 5621a-5698a, 5850a; R. VII, 6228a-6340a). During the same period Luria's share of the total scrap purchases in the North Atlantic region increased from 34.1 percent in 1947 to 74.5 percent in 1954 (App. 9a; R. VI, 5850a, 5862a, 5864a). Furthermore, in the eastern Pennsylvania subdivision the petitioning mills accounted for 84 percent of all scrap purchases from broker-dealer sources by 1954, of which Luria represented 83.3 percent (App. 9a).

In the Pittsburgh-Youngstown area, the petitioning steel mills accounted for 18 percent of the total purchases from broker-dealer sources in 1954. Between 1947 and 1954, Luria increased its share of these purchases from 20.4 percent to 36 percent (App. 9a).

Only one of the petitioners, Granite City, operates in the St. Louis area, and it accounts for nearly one-half the scrap purchases from broker-dealer sources there. In this market Luria's share increased from 16.5 percent in 1949 to 45.4 percent in 1954, after having reached a peak of 51.7 percent in 1951 (App. 9a).

Petitioners CF&I and U. S. Steel operate the only two mills in the Rocky Mountain area which purchase

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prohibiting proportions" and "would not have substantially altered the result" (App. 17a). See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364 n. 40.

scrap from broker-dealer sources. Luria has dominated this market throughout the period in question, and has enjoyed more than a 90-percent share thereof in every year from 1947 to 1954 except 1951 (App. 9a).

In the Pacific Coast region, the sole petitioning mill in the area, Bethlehem Pacific, represented almost one-half of all the scrap purchases of the mills in that area. Luria increased its share of this market from 6.6 percent in 1949 to 50.6 percent in 1954 (App. 9a).

In the United States as a whole, the petitioning mills accounted for between 24 and 38 percent of scrap purchases during the seven-year period, and Luria's share of this market increased during that period from 17.1 percent in 1947 to 36.5 percent in 1953, with a three-percent decline the following year (App. 9a).

4. *Proceedings Below.* Following extensive administrative proceedings between January 12, 1955, and May 14, 1958, the hearing examiner filed his initial decision on March 29, 1961. He found, *inter alia*, that each of the steel producers named in the complaint entered into an exclusive or substantially exclusive scrap supply arrangement with Luria, which violated the policy of Section 3 of the Clayton Act, and that these arrangements thus violated Section 5 of the Federal Trade Commission Act. The examiner's order directed Luria to cease and desist from acting as an exclusive supplier of any domestic scrap purchaser, and ordered that each of the violating steel mills refrain from appointing any exclusive scrap broker and from purchasing more than 50 percent of its annual scrap requirements from Luria for a five-

year period, unless an adequate supply could not be acquired elsewhere (R. IV, 2163a-2668a).

Upon review, the Commission, one member dissenting and two members not participating, on November 15, 1962, entered an opinion modifying and affirming the examiner's findings and conclusions (App. 40a-115a). The Commission agreed that the arrangements violated Section 5, but did not rely upon the examiner's Section 3 theory as the basis for holding the exclusive arrangements unlawful as an unfair method of competition. It grounded its decision instead on a finding that the practices were incipient violations of Sections 1 and 2 of the Sherman Act. The Commission thus upheld the examiner's order with certain modifications. Insofar as is relevant here, the Commission modified the restriction against appointment by the mills of exclusive broker-dealers to a prohibition only against appointment of Luria as an exclusive scrap supplier, and made the 50 percent of annual requirements' restriction on purchases from Luria applicable to each plant's requirements rather than the total requirements of each petitioner mill (App. 40a-121a).

On petition for review, the Court of Appeals for the Third Circuit affirmed the Commission's decision in all respects (App. 1a-33a). In addition, the court rejected petitioners' contention that the case should be remanded for new evidence on the ground that the record is stale and should be updated.[13]

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[13] The Commission also found, and the court affirmed, that Luria had (1) restrained trade in the export market for scrap and (2) violated Section 7 of the Clayton Act by acquiring the

ARGUMENT

In determining that petitioners violated Section 5 of the Federal Trade Commission Act by reason of the arrangements and understandings between Luria and each of the mills relating to the exclusive supply of scrap requirements, the Federal Trade Commission reached a conclusion fully consistent with prior decisions of this Court and the underlying policies of the antitrust laws. The Commission's decision, affirmed on review by the court of appeals, "has 'warrant in the record' and a reasonable basis in law." *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367. Accordingly, review by this Court is not warranted.

1. The Commission found that petitioners' arrangements restrained trade in violation of Section 1, and were likely to confer, if they had not already conferred, upon Luria monopoly power in the relevant markets, in violation of Section 2 of the Sherman Act (App. 75a-77a). It can scarcely be doubted, at this late date, that the Commission may employ Section 5 to arrest in their incipiency restraints of trade or attempts to monopolize, without proof that the challenged conduct amounts to "full-blown" violations of Sections 1 and 2. See *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 322; *Federal Trade Commission* v. *Motion Picture Advertising Co.*, 344 U.S. 392, 394-395.

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stock of a competing scrap broker. Review of these aspects of the Commission's order have not been sought in this Court (see L. Pet. 6).

Petitioners' contention that exclusive dealing arrangements must be governed solely by the standards of Section 3 of the Clayton Act (M. Pet. 13-19) is without substance. As this Court recently pointed out in *Brown Shoe* (384 U.S. at 322), previous decisions "hold that the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws" (see also App. 19a). It is difficult to conceive of a clearer statement of law cutting directly against petitioners' argument.[14]

Clearly, too, the absence of written agreements between Luria and the individual petitioning mills is immaterial to the establishment of a Section 5 violation based upon conduct inconsistent with policies reflected in Sections 1 and 2 of the Sherman Act. A written agreement is not an essential ingredient to the finding of a restraint of trade in violation of Section 1.[15] See, *e.g.*, *United States* v. *General Motors*

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[14] Petitioners' reliance on *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92, 98 (C.A. 2) (M. Pet. 14), is similarly misplaced. There the court held that a buyer could be held liable under Section 5 for a violation of Section 2(d) of the Clayton Act, although that provision is directed specifically at sellers. In reaching this result, it noted that the "unfair competition" concept of Section 5 "was left flexible, so that the Commission could apply the broad Congressional standard to the myriad fact situations which would arise" (*ibid.*).

[15] Nor, contrary to petitioners' contention (see L. Pet. 9, 10), is it significant that there might not have been any "economic compulsion" for producers to purchase scrap exclusively from Luria.

Corp., 384 U.S. 127, 142-143; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43; *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149. As the court below concluded (App. 17a-23a), the widespread arrangements and understandings found by the Commission examiner in the course of his exhaustive hearings provide ample support for the conclusion that the challenged arrangements were combinations which restrained trade and, unless prohibited, were likely to lead to monopoly.

Moreover, petitioners Bethlehem Pacific and U. S. Steel did in fact enter into *written* exclusive dealing contracts with Luria (App. 57a; R. IV, 2263a, 2308a). CF&I and Granite City also admitted to having formal agreements with Luria (App. 57a; R. I, 90a; R. IV, 2292a-2294a, 2349a-2350a). Even when formal agreements were purportedly terminated, no announcement was usually made to the trade, and subsequent purchases by the particular mill from Luria showed no significant decline (R. IV, 2296a, 2304a, 2330a). Although other petitioners contended that their relationships with Luria had no formal basis, there was ample evidence to support the findings of agreement made by the examiner and adopted by the Commission (App. 58a). For example, the purchasing agent for Lukens at the time it commenced buying exclusively from Luria conceded that the relationship might have been founded on an oral agreement (R. IV, 2361a); a buyer for Baldwin-Lima-Hamilton testified that he expected Luria to supply his requirements and that Luria understood what was expected of it (R. IV, 2372a); and Bethlehem Steel documents make ref-

erence to the "overall scrap deal" and "overall scrap arrangements" with Luria (R. IV, 2240a).

With respect to the remaining petitioners, the Commission was persuaded by the impressive statistical evidence of substantially exclusive dealing with Luria over a long period of time, and the sudden replacement of former suppliers by Luria, that agreements were inferentially shown by such courses of conduct. This conclusion was eminently reasonable. In a period of short scrap supply (see L. Pet. 8; M. Pet. 28), it is difficult to believe that significant purchasers would abandon previous sources of supply in favor of an exclusive supplier without a reciprocal commitment from the supplier to provide them with at least the volume of scrap they had previously been able to obtain elsewhere. As the Commission observed, "Such a massive change in an entire method of doing business would hardly be undertaken without some advance understanding" (App. 59a).

The exclusive supply arrangements resulted in substantial foreclosure of all the relevant markets to competitors of Luria (see *supra*, pp. 10-12). The most dramatic effects were felt in the North Atlantic and Rocky Mountain areas, where the petitioning mills were the only or the dominant scrap purchasers (App. 7a-8a; R. IV, 2591a-2592a, 2598a). And, in the Pacific Coast and St. Louis areas, Luria had exclusive supply arrangements with mills controlling approximately one-half of scrap purchases from broker-dealer sources (R. IV, 2597a, 2605a). Of course the amount of foreclosure effected by any one arrangement is not dispositive of its illegality. On the instant

record the Commission could justifiably be concerned about the anticompetitive effect of the widespread use of such arrangements between Luria and the several petitioning mills, representing as they did a substantial part of the scrap market. See *Atlantic Refining Co.* v. *Federal Trade Commission*, *supra*, 381 U.S. at 371; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 314.

Petitioners appear to argue (L. Pet. 9, 10-11, 16-17; M. Pet. 20-21) that the challenged arrangements cannot be held to violate Section 5, despite their demonstrable anticompetitive impact, because they are terminable at will by the mills and, in any event, the mills were motivated by "legitimate business objectives" in determining to make Luria their exclusive or substantially exclusive source of supply. But even an agreement terminable at will may continue to affect competition adversely while the parties voluntarily adhere to it. So long as such adherence is given, the arrangement is effective, and may be found unlawful. As the court below noted, "[T]here had been no termination in the past and the prospects for any in the future were negligible" (App. 22a).

On the question of purpose, the Commission found that at least some of the mills recognized that establishing Luria as an exclusive scrap broker would prevent competition among brokers for available scrap which might drive up the price to the mills. Findings detailing specific acts of discrimination against Luria's competitors (R. IV, 2211a-2257a, 2330a-2331a, 2351a) reinforce the conclusion that the challenged arrangements were intended to restrain competition and confer monopoly power upon Luria. That

some of the petitioners might also have had legitimate business reasons for participating in demonstrably anticompetitive arrangements cannot save the schemes from condemnation. Cf. *United States* v. *General Motors Corp.*, 384 U.S. 127, 142.

2. Petitioners' objections to the provisions of the cease and desist order (M. Pet. 24-27; see also L. Pet. 7) not only rest upon their misconception of the basis of the Commission's decision (see the discussion *supra*, pp. 14-15), but ignore the Commission's broad authority to take effective remedial action against violations it has found to exist. All these objections were carefully considered and rejected by the court of appeals (App. 23a-28a).

This Court has repeatedly confirmed and upheld the wide discretion given the Federal Trade Commission in promulgating orders designed to assure prompt termination of statutory violations found to exist. See, *e.g.*, *Atlantic Refining Co.* v. *Federal Trade Commission*, *supra*, 381 U.S. at 376; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428. The Commission's judgment is not to be set aside except where the remedy chosen lacks any reasonable relationship to the unlawful practices it seeks to correct. *Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612-613; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-395.

The Commission's objective here was to adopt a remedial formula designed to ensure that Luria and the mills can no longer, with or without formal agreement, restrain any appreciable amount of trade in the scrap iron industry, and also to arrest any possibility that such conduct might lead to the achievement by

Luria of monopoly power in any of the markets in which it operates. In the main, petitioners object to the provision prohibiting each mill from purchasing more than 50 percent of its scrap requirements for any of its plants from Luria for a period of five years. However, this provision was reasonably designed to correct the competitive imbalance created by the illegal arrangements, by ensuring that a substantial market would be available in which Luria's competitors could reestablish themselves. As the Commission explained in adopting this restriction, "By freeing the remaining 50% [of scrap purchases] to Luria's competitors, the hearing examiner intended to provide a 'breathing spell' of five years, during which competition could be restored" (App. 80a). See *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. at 429-430; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88. This restriction, moreover, is of limited duration, and does not apply if the mill petitioners are unable to acquire adequate supplies of scrap from Luria's competitors on terms substantially similar to those which Luria offers. Accordingly, the order is narrowly drawn to meet the specific objectives of prompt termination of past violations and restoration of competition, and is neither arbitrary nor unduly harsh.

3. Finally, petitioners' contention that the Commission's order should not be enforced because of the alleged "staleness" of the record (L. Pet. 9; M. Pet. 27-29) is without merit. Administrative proceedings are frequently lengthy and a time lag between violation and remedy is inevitable in many cases. Accord-

ingly, except where the record is rendered totally obsolete by supervening events,[16] this Court has repeatedly upheld administrative refusals to grant demands for rehearings or reopenings of records on claims of changed conditions or abandonment of unlawful conduct. See, *e.g.*, *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 514-515; *Illinois Cent. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57, 75.[17]

These considerations have particular force with respect to Federal Trade Commission orders. Abandonment of unfair practices or intervening changes in the marketing practices should not prevent the Commission from acting to assure that past violations of law do not recur. See *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257; Freedman, *The Uses and Limits of Remand in Administrative Law: Staleness of the Record*, 115 U. Pa. L. Rev. 145, 183, n. 190 (1966).[18]

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[16] See, *e.g.*, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U.S. 248, 260-262; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445-446 (C.A. 2).

[17] In this regard, petitioners' reliance (L. Pet. 7; M. Pet. 29) on *American Committee* v. *Subversive Activities Control Board*, 380 U.S. 503, is misplaced. There the statute required an organization which is *presently* a Communist-front organization to register as such (*id.* at 505), and the Board's 1960 order was based primarily on evidence taken at least five years earlier, during which time the group's one-time leader had died (*id.* at 504-505). Conversely, Section 5 empowers the Commission to proceed against past as well as present violations, if corrective measures are needed.

[18] Commission orders have been upheld by this Court on several occasions in which the cease and desist order was based

In the instant case, while the bulk of the record concerns the period 1949-1954, the record remained open before the Commission until May 7, 1958 (R. I, 7a), and the Commission retained jurisdiction in the case as late as May 21, 1963, when the certified index of the record was filed in the court of appeals.[19] Yet the petitioners, during this period, made no effort to reopen or supplement the record to attempt to show that the evidence of record did not accurately reflect continuing conditions in the industry. Under the circumstances, the court of appeals was fully warranted in concluding that the exhaustive record here compiled presented a reliable picture of the conditions in the scrap industry and thus justified enforcement of the Commission's Order (App. 33a).

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upon proof dating back approximately the same number of years as in the present situation. See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683; *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592.

[19] There were 113 days of hearings in this case, from January 12, 1955, until May 14, 1958, at which the testimony of more than 250 witnesses was received, covering approximately 14,000 pages (App. 2a; R. I, 4a-6a). In addition, the record consists of approximately 130 pages of depositions and 1,300 documentary exhibits totaling about 10,000 pages (App. 2a). The initial decision contains approximately 500 pages and the Commission's opinion 76 pages (R. IV, 2163a-2668a; App. 40a-115a). In light of these factors, the court below understandably concluded (App. 33a): "Although the proceedings in this action of necessity have been prolonged, the solid overall picture presented by the record calls for a final decision thereon at this time and not for its return to the Commission."

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Assistant Attorney General.

GREGORY B. HOVENDON,
WILLIAM R. WEISSMAN,
Attorneys.

JAMES McI. HENDERSON,
General Counsel.

J. B. TRULY,
Assistant General Counsel.

FREDERICK H. MAYER,
DAVID B. MORRIS,
Attorneys.
Federal Trade Commission.

AUGUST 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 314387 52